

Issue: Group II Written Notice (actions unbecoming thereby undermining effectiveness of agency); Hearing Date: January 29, 2002; Decision Date: January 31, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5362



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5362

Hearing Date: January 29, 2002
Decision Issued: January 31, 2002

PROCEDURAL HISTORY

On October 25, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

*Actions Unbecoming of a Corrections Officer – on 8/22/01, you were convicted of a D.U.I. Your action violates Department Policy 5-4.*¹

On November 5, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 2, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

¹ The original draft of the Written Notice cited Department Policy 5-22. During the step review process the Agency corrected what it described as a typographical error.

Agency Party Designee
Agency Representative
Human Resource Officer
Assistant Warden Operations
Sergeant

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a K-9 Corrections Officer. He has been employed by the Department for approximately two years and has performed his job well.

On August 22, 2001, Grievant was convicted of driving under the influence of alcohol contrary to *Va. Code* § 18.2-266. He was fined \$200 and sentenced to thirty days in jail with all thirty days suspended for one year conditioned on his continued good behavior. Grievant received a restricted driver's license enabling him to drive to and from work and during work as required by his employer.²

Grievant timely reported his conviction to the Agency as required by policy. The Agency then issued him a Group II Written Notice.

Maintaining a driver's license is an essential element of being a corrections officers. Corrections officers are expected to be able to transport inmates to other facilities, serve on rover patrol, and perform other duties while driving State vehicles.

² Agency Exhibit J.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

“Criminal convictions for acts of conduct occurring on or off the job which are plainly related to job performance ...” justify issuance of a Group III Written Notice under DOCPM § 5-10.17(B)(13). Driving³ under the influence of alcohol in violation of *Va. Code* § 19.2-266 is a misdemeanor.⁴ Possession of a valid Virginia driver’s license is a condition of employment for corrections officers including Grievant.⁵ Thus, Grievant’s DUI conviction plainly related to his job performance thereby justifying issuance of a Group III Written Notice. The Agency chose to issuance Grievant a Group II Written Notice and that action must be upheld.

Grievant contends the Agency cannot discipline him because his DUI conviction was for activities outside of his employment and not affiliated with Agency in any way. DOCPM § 5-10, however, permits the Agency to discipline employees for behavior outside of their employment. Section 5-10.7 of this policy states:

The Standards of Conduct in this procedure are designed to protect the well-being and rights of all employees; to assure safe, efficient government operations and to assure compliance with public law. (Emphasis added.)

This language suggests an employee may be disciplined for failure to comply with any public law regardless of whether the employee was working at the time of the violation. In addition, DOCPM § 5-10.17(B)(13) specifically references criminal convictions “on or off the job” as a possible basis to discipline an employee.

Grievant contends that DHRM Policy 1.05 on *Alcohol and Other Drugs* is the controlling policy. This policy only authorizes discipline for a criminal conviction of DUI

³ Virginia law creates a distinction between traffic infractions and felonies and misdemeanors. Traffic infractions are violations of public order and are not deemed to be criminal in nature. *Va. Code* § 18.2-8. A traffic infraction is a violation of motor vehicle law that is neither a felony nor a misdemeanor. *Va. Code* § 46.2-100. For example, a speeding ticket for driving 30 miles per hour in a 25 mile per hour zone would be a traffic infraction and not a misdemeanor.

⁴ *Va. Code* § 18.2-270.

⁵ Agency Exhibit B.

based upon conduct occurring in the workplace. If DHRM Policy 1.05 were the only policy governing Grievant's case, then he would be correct that the Agency could not discipline him for a DUI offense outside of employment. DOCPM § 5-10, however, also governs Grievant's actions and it specifically addresses criminal convictions outside of employment.

The Agency contends Grievant's actions were contrary to DOCPM § 5-4, *Standards of Ethics and Conflict of Interest*. Section 5-4.6 of this policy provides a general statement that, "Employees of the Department shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth." Prohibited conduct under this policy includes, for example, accepting money for services performed within the scope of their official duties, accepting money for obtaining employment within the Department, using confidential information for one's own benefit, accepting money from individuals doing business with the Department, and gaining a financial benefit that may influence their job performance. A plain reading of this policy shows it is designed to address the money, business, or financial dealings an employee has that may adversely affect the Department. Criminal convictions are not within the scope of this policy despite the general statement. Grievant did not engage in behavior unbecoming a corrections officer.

Grievant contends that because the Agency cited an incorrect policy as the basis for its discipline that the disciplinary action must be reversed. This argument is untenable. An agency may discipline an employee without citing a violation of any specific policy so long as it identifies the conduct to which it objects. The Agency's written notice specifies the conduct for which Grievant is being disciplined. The absence of a correct policy citation does not defeat the disciplinary action.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. DOCPM § 5-10.13(B). The Agency issued only a Group II Written Notice after considering Grievant's quality work performance and the fairness of disciplining him. The Agency's mitigation is reasonable and appropriate under the facts of this case and, therefore, the Hearing Officer will not further reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer